

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Date of decision: 08th February, 2019

+ LPA 282/2017

FOOD CORPORATION OF INDIA

..... Appellant

Through: Mr. Om Prakash, Mr. R.R. Pathak and
Mr. Pradeep Kumar Tripathi, Advs.

versus

ITC LIMITED

..... Respondent

Through: Mr. Arvind Nigam, Sr. Adv. with
Mr. L.K. Bhushan and
Ms. Aditi Awasthy, Advs.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE V. KAMESWAR RAO

V. KAMESWAR RAO, J. (ORAL)

1. This Intra-Court appeal has been filed by the Food Corporation of India challenging the order dated December 22, 2016 passed by the learned Single Judge in W.P. (C) 7145/2015 and an order dated August 16, 2017 in Review Petition No. 64/2017 in W.P. (C) 7145/2015 as per amended memo of appeal at page 296 of the paper book.

2. Vide the first order dated December 22, 2016, the learned Single Judge has directed the refund of ₹42,56,250/- within a period of four weeks, failing which the appellant was liable to pay simple

interest at the rate of 9% per annum. It transpired that during the pendency of the appeal, a review petition was filed by the respondent seeking correction of a mistake apparent on the face of the record in the judgment dated December 22, 2016. In para 9 of the order dated August 16, 2017 it is recorded that the figure of ₹42,56,250/- relates to Earnest Money Deposit, which is one of the components of the security deposit and not the entire security deposit amount forfeited by the respondent which is ₹1,13,10,702/-.

3. Vide the order dated August 16, 2017, the learned Single Judge has directed the refund of an amount of ₹1,13,10,702/- within a period of four weeks, failing which the appellant was liable to pay simple interest at the rate of 9% per annum till the refund is made in full.

4. The facts as noted from the record are that the appellant had floated a tender for sale of wheat at Food Supply Depot Mokama, Food Supply Depot Buxar and Food Supply Depot NRPA, inviting bids from empanelled bulk buyers to lift the entire quantity of wheat from each of the three Centres. The respondent participated in the tender and was successful in its bid for purchase of 2,000 metric tonnes of wheat at Mokama and 1000 metric tonnes of wheat at

Buxar. The respondent deposited an amount of ₹42,56,250/- towards Earnest Money Deposit. Letter of allotment was issued to the respondent by the appellant on September 07, 2012 approving the delivery of the aforesaid quantity from the respective Depots. The respondent was allocated specified time to lift the entire quantity of wheat. Clause (H) of the Tender stipulated that if the entire stock could not be lifted due to Force Majeure or due to the operational constraints of the Food Corporation of India, then the respondent would be entitled to refund of all the amount of the unlifted quantity of wheat.

5. It is an admitted position that the respondent could not lift the entire quantity of wheat within the period stipulated. The case of the respondent was that there were operational constraints on the part of the appellant because of which the entire quantity could not be lifted. The learned Single Judge has reproduced a chart for both the places i.e. Buxar and Mokama and narrated the reasons for which the total quantity of wheat could not be lifted by the respondent. The learned Single Judge has also in para 13 noted a communication dated May 08, 2013 of the General Manager, Regional Officer, Patna, informing the Executive Director, Food

Corporation of India, Zonal Office, Kolkata that non-lifting of food grains was due to Force Majeure as well as operational difficulties of Food Corporation of India. The General Manager recommended refund of the cost of the unlifted quantity for both the Depots. The learned Single Judge has also noted that the entire amount for unlifted quantity has been refunded to the respondent.

6. On noting this important aspect, the learned Single Judge concluded that when the appellant itself has refunded the entire cost of unlifted stock because of Force Majeure conditions and their own operational difficulties, the same amounts to an admission on the part of the appellant and the respondent was not at fault or in breach of any of the condition of not lifting the entire stock.

7. He accordingly directed the refund of the security amount of ₹42,56,250/- initially but subsequently by way of Review Petition directed the amount of ₹1,13,10,702/- to be refunded within a period of four weeks otherwise simple interest at the rate of 9% per annum was to be paid.

8. The only submission made by Mr. Om Prakash, learned counsel appearing for the appellant / Food Corporation of India was that the learned Single Judge has erred in only taking into

consideration a communication of the General Manager dated May 08, 2013 overlooking the view of the Executive Director, Zonal Officer on the said letter. It is respondent, who was responsible for not lifting the entire quantity of wheat for the reasons attributable to the respondent. His submission was that the respondent did not engage sufficient trucks on a particular date to lift maximum quantity of wheat. The relevant pages which he has referred to are 270 and 271 of the paper book which reads as under:

“Applying the said yard stick to the instant case, it has been found that M/s ITC Ltd. Has not made any serious effort throughout the contract period to complete the lifting of allotted stocks and ended up lifting a very small quantity. At FSD Mokama, 2000 MT was allotted to the party for which 223 trucks @ 9 MT per truck) i.e. 16 trucks per day for 14 days (including extension period) were required to be placed at the depot for loading. At the beginning itself, the party lost two days as it started the lifting two days after issuance of acceptance letter. Further, the party placed 47 trucks only for loading during the entire period of contract. The number of trucks placed on each day ranges from three to five except on two occasions when 10 trucks were placed. On two days no truck was placed.

Resultantly, M/s. ITC Ltd. could lift only 491.372 MT leaving a balance of 1508.629 MT (as per statement enclosed with RO's letter dated 28.08.2013). Except the two days of Force Majeure events as mentioned above, all the working days were available to the party for completing the lifting at FSD, Mokama.

At FSD Buxar, where 1000 MT was allotted to the party, the situation is still worse as the party placed only 11 trucks in total against the requirement of 112 trucks @ 9 MT per truck). Here also the lifting was started by the party two days after issuance of acceptance letter and the number of trucks placed on each day ranges from one to five. On most of the days not even a single truck was placed by the party. Resultantly, the party lifted only 15.3.25 (sic 153.25) MT leaving a balance of 846.75 MT. At this depot, although three-four working days seem to have been lost due to operational difficulty but still enough period was available for lifting a substantial quantity."

9. We have seen the stand of the appellant in those pages. Suffice it to state that the total period within which the respondent was required to lift material was 14 days. It is a conceded position and also noted by the learned Single Judge that out of 14 days there

was impediment on ten days in the Food Storage Depot Buxar because of which the wheat could not be lifted. Similarly, out of 14 days the wheat could not be lifted on five days at Food Storage Depot Mokama which reasons are attributable to the appellant herein.

10. We are not impressed with the sole submission made by the learned counsel for the appellant that the non lifting of the complete stock of wheat within 14 days can be attributed to the respondent herein as period of 10 days and 7 days respectively are, sufficiently large period which were not availed of by the respondent to lift the wheat. The reasoning of the appellant, that the respondent had, on certain days, not engaged any truck or engaged less number of trucks is not a justification for the appellant, to contend that the respondent had not lifted the complete wheat within the fixed period, when the appellant had not given 14 clear days to the respondent to lift the wheat.

11. We do not see any merit in the appeal, the same is dismissed. The amount deposited by the appellant Food Corporation of India in this Court in terms of order dated March 19,

2018 shall be released in favour of the respondent herein with accrued interest, if any, within four weeks from today. No costs.

V. KAMESWAR RAO, J

CHIEF JUSTICE

FEBRUARY 08, 2019/aky

